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JUL 23 1996

July 23, 1996 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: NEW - Channel 51
Center Point, Alabama

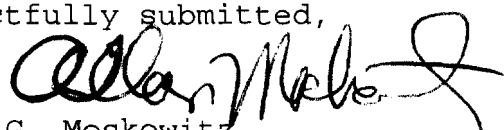
Dear Mr. Caton:

Transmitted herewith is an original and four (4) copies of a "Petition for Rulemaking" to allot Channel 51 to Center Point, Alabama, as its first local transmission television service. A contingent application for construction permit for a new television station to operate on Channel 51 at Center Point, Alabama, is being transmitted simultaneously under separate cover. A request for waiver of Sections 73.607 and 73.3517 of the Commission's rules is included in the application. Additionally, a request for waiver of Sections 73.610 and 73.698 is included in the application and the instant "Petition".

A request for waiver of the "freeze" imposed by the Commission in Advanced Television Systems and Their Impact on the Existing Television Broadcast Service is also included in the application and in the "Petition for Rulemaking".

Should any questions arise concerning this matter, please contact the undersigned counsel.

Respectfully submitted,


Allan G. Moskowitz

Counsel for Pelican Broadcasting Company

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MMB

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

RECEIVED

JUL 23 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Section 73.606(b) of the)
Commission's Rules, TV Table of Allotments,)
to allot Channel 51 to Center Point, Alabama)

MM Docket No. _____
RM No. _____

To: Chief, Allocations Branch

PETITION FOR RULEMAKING

Pelican Broadcasting Company, by counsel, and pursuant to Section 1.401 of the Commission's rules, hereby requests the Commission to institute a rulemaking proceeding for the purpose of amending the TV Table of Allotments to allot Channel 51 to Center Point, Alabama, as that community's first local television service.¹ Pelican Broadcasting Company proposes to amend Section 73.606(b) of the Commission's rules as follows:

	<u>Channel No.</u>
<u>City</u>	<u>Present</u> <u>Proposed</u>
Center Point, Alabama	- - - 51

No change in the existing allotments is requested. In support of this request, the following is stated:

¹ The proposed allotment of Channel 51 at Center Point is within the freeze zone established by Advanced Television Systems and Their Impact on the Existing Television Service, 52 FR 28346 (published July 29, 1987) ("Freeze Order"). Accordingly, attached hereto is a request for waiver of the Freeze Order. As explained in greater detail therein, this petition is part of a series of rulemaking petitions and applications for new television stations, many of which request the Commission to waive its Freeze Order to permit the allotment of a new television channel and/or the acceptance of an application for a new television station in approximately 40 television markets.

The city of Center Point, Alabama, is a census designated place with a 1990 U.S. Census population of 22,658. The community has three zip codes and is served by at least one bank.

As demonstrated in the attached engineering exhibit, the proposed allotment and the facilities proposed in the accompanying application would be short-spaced to the reference coordinates for a vacant Channel 51 allotment at Young Harris, Georgia, by 7.8 kilometers. The amount of this short-spacing, representing a mere 2.8 percent, is slight. Therefore, the likelihood that actual interference would occur is quite low. The slight shortage is well within the range of short-spacing that has been approved in the past. See, e.g., Sarkes Tarzian, Inc., 6 FCC Rcd 2465 (1991) (8.3 mile short-spacing approved); Clay Broadcasting Corp., 51 R.R.2d 916 (1982) (five mile short-spacing approved). Moreover, because of the minor short-spacing between the proposed site and the vacant Channel 51 allotment at Young Harris, there is a wide area in which a future station operating on Channel 51 could be located at the required spacing, and still provide a requisite city-grade signal to Young Harris. See Delta Rio Broadcasting, 50 FCC 2d 596 (1974).

The proposed station also will co-locate with WNAL-TV, Gadsden, Alabama, in order to avoid possible interference which might result from a UHF "taboo," due to the fact that WNAL-TV operates on Channel 44 seven channels away from the proposed Center Point allotment. The proposed co-location of the stations, however, will virtually eliminate the possibility of such interference. Moreover, the required spacing listed in Section 73.698 reflects the UHF "taboo" which is designed to prevent local oscillator interference. The Commission itself has questioned the need for this taboo. In a report entitled "A Study of UHF Television Receiver Interference Immunities," OET Technical Memorandum, FCC/OET TM-3, August 1987, the Commission's

staff found in a study of 1983 model receivers that UHF performance with regard to local oscillator interference was generally comparable with or better than the VHF reference. Id. at 7. No particular spacings are required for VHF stations seven channels apart, and no interference problems have been found. Moreover, since 1983, receiver design has advanced considerably. Since receivers are now electronic, and their components are sealed, local oscillator radiation is no longer the problem it used to be. Thus, the underlying rationale for the UHF taboo no longer exists, and no local oscillator interference is likely.

The purpose of the Commission's spacing rules is to prevent interference between stations. Outlet Co., 11 FCC 2d 528 (1968). Taking into account the lack of a need for the UHF taboo in question, the proposed new station would serve the purpose of that rule as well as a fully-spaced station. Therefore, since the proposed new station would fulfill the intent of the spacing rules while at the same time providing the major public interest benefits set forth below, the allotment should be made as requested.

As stated above, the allotment of Channel 51 will provide Center Point with a first local television service, which will promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various States and communities. 47 U.S.C. §307(b). See National Broadcasting Co. v. U.S., 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States"); FCC v. Allentown Broadcasting Co., 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression"). In addition, the proposed allotment will promote the second television allotment priority established in the Sixth Report and Order in Docket Nos. 8736 and 8975, 41 FCC 148,

167 (1952), of providing each community with at least one television broadcast station. The proposed allotment also will permit an additional network to serve the Birmingham television market. Therefore, the allotment will serve the public interest.

Contemporaneously herewith, the petitioner is filing an application for a construction permit for the new facility contingent upon the grant of the proposed allotment. In the event its application is granted, the petitioner will promptly construct the new facility.

WHEREFORE, in light of the foregoing, Pelican Broadcasting Company respectfully requests the Commission to GRANT this petition for rulemaking, AMEND the TV Table of Allotments, and ALLOT Channel 51 to Center Point, Alabama, as that community's first local television service.

Respectfully submitted,

Pelican Broadcasting Company

By: 
Allan G. Moskowitz

Its Counsel

Kaye, Scholer, Fierman,
Hays & Handler, LLP
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

July 23, 1996

WES, INC.
5925 CROMO DR.
EL PASO, TX 79912

915-581-0306

ENGINEERING EXHIBIT RM:

For Center Point, AL
CH 51

JUNE 14, 1996

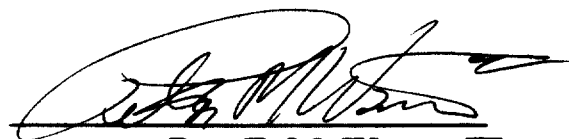
ENGINEERING STATEMENT IN SUPPORT OF A
PETITION FOR RULE MAKING
TO AMEND
THE TV TABLE OF ASSIGNMENTS

WES, INC.

DECLARATION

I, Pete E. M. Warren III, declare and state that I am a Certified Engineer, Class I, Senior, with Master Endorsement radiating and non-radiating, by The National Association of Radio and Telecommunications Engineers, Inc., and my qualifications are a matter of record with the Federal Communications Commission, and that I am an engineer in the firm of WES, Inc., and that the firm has been retained to prepare an engineering statement in support of a Petition to Amend the TV Table of Assignments.

All facts contained herein are true to my knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. All Exhibits were prepared by me or under my supervision. I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'Pete E. M. Warren III', with a long horizontal flourish extending to the right.

Pete E. M. Warren III

Executed on the 14th day of June, 1996

Narrative Statement

I. General

The purpose of this engineering statement is to support a request that the TV Table of Assignments be amended to add Ch. 51 at Center Point, AL. The proposed channel has extremely minor short-spacing as can be seen by the channel spacing study; however, a contingent application will be submitted demonstrating non-interference and co-location with channel 44 WNAL-TV to eliminate a +7 “UHF taboo” interference

It should be noted that the area in question is not within 320 kilometers (200 miles) of a US Border and, therefore, foreign concurrence is not required.

II. ENGINEERING DISCUSSION

A. Proposed site:

We propose a site located at the following coordinates:

Latitude: 33 44 51

Longitude: 86 32 08

The allocation limited to a radius of approximately 2 km to eliminate interference.

B. Channel Allocation Study

Exhibit 1 is a Channel Allocation Study of channel 51. The study indicates the required separation in kilometers to all known Licenses, construction Permits, Open Allocations, pending Allocations, and pending Rule Makings.

Exhibit 2 is a map of the resulting arcs indicating minimum separation and a circle showing area to locate.

C. Public Interest Showing:


1. This would be the first allotment to Center Point, AL. The petitioner believes that the requested channel addition is in the Public Interest and, therefore, should be granted by the Commission.
2. An additional station in the area would allow for carriage of a fifth network.

III. SUMMARY

Petitioner request that the TV Table of Assignments be amended as follows:

City	Present	Proposed
Center Point, AL	None	51o

June 14, 1996



Pete E.M. Warren III

EXHIBIT #1

CHANNEL ALLOCATION STUDY

by WES Inc.

TV CHANNEL SPACING STUDY

Job title: CENTER POINT AL

Channel: 51

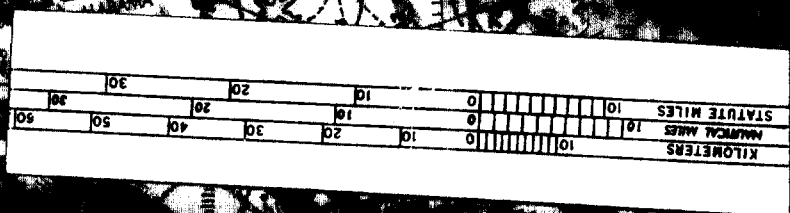
Database file name: c:\tvsrc\tv960524.edx

Latitude: 33 44 51

Longitude: 86 32 8

CH	Call	Record No.	City	ST	Z	STS	Bear.	Dist.	Reqd. Dist.	Result
51-	ALLOTM	2716	YOUNG HARRIS	GA	2		60.6	273.0	280.8	-7.8
65-	ALLOTM	3261	CEDARTOWN	GA	2		75.6	122.1	95.7	26.4
44+	WNALTV	3437	GADSDEN	AL	2	L	51.9	37.6	95.7	-58.1
44+	WNALTV	3438	GADSDEN	AL	2	A	.0	.0	95.7	-95.7
56-	ALLOTM	3463	ARAB	AL	2		3.4	63.2	31.4	31.8
36-	WFIQ	3627	FLORENCE	AL	2	L	309.2	147.3	119.9	27.4
36-	WFIQ	3628	FLORENCE	AL	2	C	309.2	147.3	119.9	27.4

***** End of channel 51 study *****



In the Matter of)
)
Amendment of Section 73.606(b) of the) MM Docket No. _____
Commission's Rules, TV Table of Allotments,) RM No. _____
to allot Channel 51 to Center Point, Alabama)

To: Chief, Allocations Branch

REQUEST FOR WAIVER OF SECTIONS 73.610 AND 73.698

Petitioner hereby seeks a waiver of the Commission's spacing requirements as set forth in Sections 73.610 and 73.698 of the Commission's Rules. This waiver is required in order to allow the addition of a new television station which would provide first local service to Center Point, Alabama, and the institution of new network service to the Birmingham market.

As set forth in the attached Engineering Exhibit, the proposed allotment and the facilities proposed in the accompanying application would be short-spaced to the reference co-ordinates for a vacant Channel 51 allotment at Young Harris, Georgia, by 7.8 kilometers. The amount of this short-spacing, representing a mere 2.8 percent, is slight. Therefore, the likelihood that actual interference would occur is quite low. The slight shortage is well within the range of short-spacing that has been approved in the past. See, e.g., Sarkes Tarzian, Inc., 6 FCC Rcd 2465 (1991) (8.3 mile short-spacing approved); Clay Broadcasting Corp., 51 R.R.2d 916 (1982) (five mile short-spacing approved). Moreover, given the fact that there is no station operating on the channel at this time and the minor nature of the short-spacing involved, it is possible that a site restriction on the Young Harris allotment would allow the proposed Center Point station and any potential Young Harris

station to be fully spaced.

The proposed station also will co-locate with WNAL-TV, Gadsden, Alabama, in order to avoid possible interference which might result from a UHF “taboo,” due to the fact that WNAL-TV operates on Channel 44, seven channels away from the proposed Center Point allotment. The proposed co-location of the stations, however, will virtually eliminate the possibility of such interference. Moreover, the required spacing listed in Section 73.698 reflects the UHF “taboo” which is designed to prevent local oscillator interference. The Commission has itself questioned the need for this taboo, however. The distance separations contained in Section 73.698 were designed to afford protections based on the mixing of multiple signals that potentially could disturb the reception in television receivers available thirty years ago. Receiver technology has changed dramatically since that time. In a report entitled ‘A Study of UHF Television Receiver Interference Immunities,’ OET Technical Memorandum, FCC/OET TM-3, August 1987, the Commission’s staff found in a study of 1983 model receivers that UHF performance with regard to local oscillator interference was generally comparable with or better than the VHF reference. *Id.* at 7. No particular spacings are required for VHF stations seven channels apart, and no interference problems have been found. Moreover, since 1983, receiver design has advanced considerably. Since receivers are now electronic, and their components are sealed, local oscillator radiation is no longer the problem it used to be. Modern receivers rely on electronic tuning using large scale integrated circuits, varactors, and shielded oscillators. Thus, the underlying rationale for the UHF taboo no longer exists, and no local oscillator interference is likely.

The purpose of the Commission’s spacing rules is to prevent interference between stations. Outlet Co., 11 F.C.C.2d 528 (1968). Taking into account the lack of a need for the UHF taboo in

question, the proposed new station would serve the purpose of that rule as well as a fully spaced station. Therefore, since the proposed new station would fulfill the intent of the spacing rules while at the same time providing the major public interest benefits set forth below, the allotment should be made as requested.

The public interest benefits of the proposed allotment far outweigh any potential detriments. First, the community of Center Point would gain its first local transmission television service, one of the basic goals of the Communications Act of 1934, as amended (47 U.S.C. §307(b)). Of more far-reaching importance, however, the proposed allotment is part of a larger plan to allow the development of The WB Television Network as a competitive fifth national network. Not only would this development benefit local residents, who would see increased competition and diversity of viewpoints in the television market, but it also would be of national significance.

The Commission has long considered the provision of a new network service in an area to be a factor favoring grant of a waiver of the Commission's spacing rules. Caloosa Television Corporation, 3 FCC Rcd 3656 (1988); Roy H. Park Broadcasting, Inc., 45 R.R.2d 1083 (B/cast Bur. 1979); Television Broadcasters, Inc. 5 R.R.2d 155 (1965). In this instance, much of the service area of the proposed new station could receive WB network service over the air for the first time.

Moreover, as set forth above, the proposed allotment is one of a series of proposed allotments and new stations which each will help ensure the survival and growth of WB by providing the means to compete with the other networks nationwide. The Commission has stated that it is the Commission's "duty to provide, when possible and feasible, the opportunity for effective competition among the networks." Television Broadcasters, Inc. 5 R.R.2d at 160 (emphasis in original). The Commission has waived its spacing rules in order to allow that competition to take place. Id. In

Television Broadcasters, the Commission sought to encourage the growth of the ABC network. Given the chance to compete effectively, ABC did emerge as one of the “Big Three” networks. Petitioner now seeks the same opportunity for WB to compete to become an established national network. The proposed allotment is an integral part of that plan.

The Commission has long recognized that implementation of an overall plan which would benefit the public interest may justify short-spacing waivers in individual cases. In Nebraska Educational Television Commission, 4 R.R.2d 771 (1965), the Commission waived its spacing requirements to allow for the prompt implementation of a state-wide plan for educational television. In that case, the Commission found that the implementation of the state-wide plan was an overriding public interest consideration which required waiver of the spacing rules. The cumulative effect of the allotments and stations proposed in this instance would provide similar public interest benefits, but on a nationwide scale. WB can emerge as a new national network only if it is present in the major markets. Only then can the benefits of greater competition among networks and enhanced diversity of viewpoint be fully realized. Therefore, the public interest clearly demands that the Commission’s spacing rules be waived in the instant case. The requested waiver would provide increased diversity in the broadcast television market, both locally, through the allotment of a first local television station, and nationally, through the development of a new network.

REQUEST FOR WAIVER OF ATV "FREEZE"

INTRODUCTION

Petitioner respectfully requests that the Commission grant a waiver of its "Freeze Order"¹ so that it may petition to amend the Television Table of Allotments and apply for a construction permit for Channel 51 in Center Point, Alabama. In July 1987, the Commission adopted the Freeze Order which temporarily fixed the Television Table of Allotments for 30 designated television markets and their surrounding areas (hereinafter "freeze zones").² The Freeze Order also proscribed construction permit applications for vacant television allotments in these areas.³

By its own terms, however, the Freeze Order envisions waivers "for applicants which provide compelling reasons why this freeze should not apply to their particular situations or class of stations."⁴ Although Center Point falls within a freeze zone, "compelling reasons" exist for the Commission to waive the freeze.

I. FACTUAL BACKGROUND

This petition and accompanying waiver request are being filed contemporaneously with an application for a construction permit to bring Center Point its first local television service.

¹ *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987), 52 Fed. Reg. 28346 (1987) ("Freeze Order").

² The freeze zones are determined by the minimum co-channel separation requirements set forth in 47 C.F.R. § 73.610 and have radii ranging from 169.5 miles to 219.5 miles for UHF stations depending upon the region of the country in which the proposed station is located.

³ Freeze Order at *2.

⁴ *Id.* at *3. Of course, the FCC is always required to consider waiver requests and is required to grant a waiver when grant of the waiver would better serve the public interest than application of the underlying rule or policy. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Simultaneously herewith, Pelican Broadcasting Company is filing similar applications in other communities -- many of which also require a waiver of the Freeze Order.

These petitions and accompanying applications are being filed in tandem with a series of other rulemaking petitions and applications, which together cover many of the top 100 markets in which there are no full power stations available to primarily affiliate with The WB Television Network ("The WB"), a network with which the applicants have existing affiliations. The WB has indicated a willingness to enter into affiliation agreements with these applicants in the respective communities should they obtain a license.⁵

To the extent these applicants are able to obtain any of these licenses, the community will also benefit by getting a first local television service,⁶ which will provide viewers in the community -- including children -- with the benefit of receiving another station's programming. And The WB will benefit, by taking another step toward achieving national penetration.⁷ While these benefits -- including The WB's interest in building a nationwide network -- will obviously be maximized if the Commission waives the freeze in as many markets as are requested in these

⁵ We note, in this regard, that there is no commitment on any party's part to enter into such an agreement.

⁶ Indeed, we must concede that this benefit will be achieved by grant of this waiver irrespective of whether the license is ultimately granted to any of these applicants.

⁷ Establishing a nationwide network of affiliates is crucial given that The WB's national advertisers currently require coverage of *at least 80 percent* of the country. The WB's over-the-air broadcast affiliates, however, currently cover only 65% of the country. Cynthia Littleton, *WB, UPN rally the troops*, *Broadcasting & Cable*, June 10, 1996, at 20. Although The WB's over-the-air coverage is supplemented with superstation WGN(TV)'s cable coverage by approximately 19 percent, this cable coverage is far from equivalent to over-the-air broadcast coverage. This is because one third of all households (approximately 35 million households) do not subscribe to cable, and instead rely upon free television as their sole access to the video marketplace.

applications, the waiver request is not hinged on an all-or-nothing response. Simply stated, the more markets the better -- but each additional market will help.

II. GRANT OF THE WAIVER WILL SERVE THE PUBLIC INTEREST

As the Commission envisioned, in some cases the compelling reasons justifying a waiver will apply at the local level, while in other cases the compelling reasons will apply to a class of stations.⁸ Here, there are compelling reasons at both the local *and* national level, making the grounds for a waiver particularly compelling.

At the local level, grant of the requested waiver would permit Center Point, Alabama, to have a first local television service. At the national level, this petition and accompanying waiver request are part of a series of rulemaking petitions asking the Commission to allot new channels or reallocate existing channels, the effect of which will be to create many new television stations -- and, correspondingly, more opportunities for a new network like The WB to obtain critical affiliates providing coverage -- in the top 100 markets. As set forth more specifically in the applications filed contemporaneously herewith, the stations will be owned by entities which have indicated their interest in affiliating the stations with The WB, a still incipient, over-the-air television network that currently lacks full power, primary affiliations in the communities specified in these applications.⁹

⁸ Freeze Order at *3.

⁹ Again, however, there is no commitment to affiliate, nor are there any penalties for failure to affiliate.

A. GRANT OF THE REQUESTED WAIVER WILL ACHIEVE MARKET-SPECIFIC PUBLIC INTEREST BENEFITS

Grant of the requested waiver will serve the public interest by providing Center Point, Alabama, with its first local television service. The Commission has found on at least one occasion that a waiver of the Freeze Order was in the public interest, at least in part, because the proposed reallocation would provide the first local television service to the community.¹⁰ In that case, the Commission noted that the proposed reallocation would promote one of the overarching priorities in the allocation of television channels -- providing at least one local television broadcast station to every community.¹¹

In this case, the allocation of Channel 51 to Center Point will promote this Commission objective and, at the same time, promote the statutory objective set forth in Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various States and communities.¹² Grant of this waiver request is a necessary first step to bringing a first television station to this community. In and of itself, this presents a compelling justification for waiving the freeze.

¹⁰ *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Modesto and Ceres, California)*, 6 FCC Rcd 3613 (1991) (non-commercial educational channel).

¹¹ *Id.*; see also *Amendment of Section 3.606 of the Commission's Rules and Regulations; Amendment of the Commission's Rules, Regulations and Engineering Standards Concerning the Television Broadcast Service; Utilization of Frequencies in the Band 470 to 890 MCS for Television Broadcasting*, 41 FCC 148, 167 (1952) ("Sixth Report and Order").

¹² 47 U.S.C. §307(b). See *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression").

**B. GRANT OF THE REQUESTED WAIVER WILL ACHIEVE
NATIONWIDE PUBLIC INTEREST BENEFITS**

Waiving the freeze in this and the other communities applied for in this series of rulemaking petitions and applications will also promote significant public interest objectives on a national level. A waiver will advance the Commission's long-standing public interest objective of fostering the growth of new national over-the-air television networks.¹³ And it will enhance broadcast diversity and competition in the local marketplace.

**1. Grant Of The Requested Waiver Will Encourage The Development
Of New National Television Networks**

The Commission has long espoused a commitment to foster the ability of new networks to enter and compete in the television marketplace. As far back as 1941, when the Commission adopted its Chain Broadcasting rules, a primary goal of the Commission was to remove barriers that would inhibit the development of new networks.¹⁴ The Commission explained that the Chain Broadcasting rules were intended to "foster and strengthen broadcasting by opening up the field to competition. An open door to networks will stimulate the old and encourage the new."¹⁵

¹³ See *Report On Chain Broadcasting*, Commission Order No. 37, Docket 5060 (May 1941) at 88 ("Report on Chain Broadcasting"); *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d 318, 333 (1970); *Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. § 73.658*, 5 FCC Rcd 3211, 3211 and n.9 (1990), (citing Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (Vol. 1 Oct. 1980)), waiver extended, 6 FCC Rcd 2622 (1991).

¹⁴ *Report on Chain Broadcasting* at 88. Although the Chain Broadcasting rules were originally adopted for radio, they were applied to television in 1946. *Amendment of Part 3 of the Commission's Rules*, 11 Fed. Reg. 33 (Jan. 1, 1946).

¹⁵ *Report on Chain Broadcasting* at 88.

The Commission has remained steadfast in its commitment to its goal of nurturing new networks. The history of the Commission's financial interest and syndication ("finsyn") rules is a case in point. Even as the regulation itself has changed over the last 25 years, the Commission has not wavered from the goal of nurturing new networks. In 1970, when it first adopted the finsyn rule, the Commission noted that "[e]ncouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of this Commission."¹⁶ More than two decades later, when the Commission took action first to relax and later to eliminate the finsyn rule, it did so at the behest of the newest network entrant, Fox. Indeed, pending its review of the rule, the Commission granted Fox's request for a limited waiver of the rule.¹⁷ As Commissioner Duggan explained, "Fox has been a bright and innovative force. The existence of a fourth network is certainly in the public interest. . . . Fox deserves to be encouraged."¹⁸ In 1995, in deciding to phase out the finsyn rule entirely, the Commission similarly evaluated the rule's impact on "[t]he overall business practices of emerging networks, such as Fox, in the network television and syndication business . . . [and] [t]he growth of additional networks, including the development of Fox and its position vis-à-vis the three major networks."¹⁹

¹⁶ *Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d at 333.

¹⁷ *Fox Broadcasting Co.*, 5 FCC Rcd at 3211 (1990).

¹⁸ *Broadcasting & Cable*, May 7, 1990, ed., p. 28; *accord*, *Application of Fox Television Stations, Inc. for Renewal of License of Station WNYW-TV, New York, New York*, 10 FCC Rcd 8452, 8528-29 (1995) (Commissioner Quello stating in his concurring statement, "I believe . . . that the creation of the fourth network was a compelling public interest goal.").

¹⁹ *Evaluation of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165, 12166 (continued...)

Appropriately, the Commission's goal of fostering new networks has not been limited to Fox. When the Commission first expanded its multiple ownership rule, it did so with the stated hope of fostering new networks.²⁰ In addition, the Commission has crafted rules and granted a variety of waivers designed to foster the development of new networks over the years. In 1967, for example, the Commission granted a waiver of the dual network rule to ABC -- the then new network entrant -- in connection with ABC's four new specialized radio networks. Although operation of the four networks violated the dual network rule, the Commission nevertheless concluded that waiver of the rule was appropriate because ABC's proposal "merits encouragement as a new and imaginative approach to networking."²¹ The Commission explained that it was "of more than usual importance to encourage to the extent possible innovation and experimentation in the operation of networks."²² In 1981, the Christian Broadcasting Network was granted a limited waiver of both the prime time access and the finsyn rules.²³ The Commission reasoned that a waiver was appropriate because the rules were adopted in part to

(...continued)
(1995).

²⁰ *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 FCC 2d 17, 45 (1984) ("Multiple Ownership") (relaxing restrictions on multiple ownership advances "Commission's diversity goal by providing alternatives to the three television networks"). Although Fox was the first of these alternatives, there has never been, nor should there be, any notion that one alternative was all that was needed.

²¹ *Proposal of American Broadcasting Cos., Inc. to Establish Four New Specialized "American Radio Networks,"* 11 FCC 2d 163, 168 (1967).

²² *Id.* at 165.

²³ *Request of the Christian Broadcasting Network, Inc. for Waiver of Section 73.658(j)(4) of the Commission's Rules*, 87 FCC 2d 1076, 1078 (1981).

attempt to ensure the development and growth of other "lesser" organizations.²⁴ The Commission followed the same line of reasoning in subsequently granting Home Shopping Network waivers of the dual network and prime time access rules. The Commission noted, for example, that simultaneous operation of two Home Shopping networks was "consistent with the Commission's goals of encouraging alternatives to traditional networking."²⁵

Most recently, the Commission expressed its continued interest in fostering new networks in proposing to amend various network/affiliate rules. Sprinkled throughout the notice of proposed rulemaking are questions about the impact that the proposed changes could have on the latest entrants, The WB and UPN.²⁶ For example, the Commission queried whether its prohibition on time optioning "might inhibit the growth of new networks."²⁷ Likewise, in considering whether to eliminate its prohibition on exclusive affiliation, the Commission expressed its concern "that permitting exclusive affiliation in smaller markets might preclude the development of new networks in those markets, thus depriving the public of the benefits of competition and diversity."²⁸ The Commission's interest in helping, not harming, new networks is clear.

²⁴ *Applicability of 47 C.F.R. § 73.658(g) and 47 C.F.R. § 73.658(k) to Home Shopping, Inc.*, 4 FCC Rcd 2422, 2423 (1989) ("*Home Shopping*").

²⁵ *Home Shopping*, 4 FCC Rcd at 2423.

²⁶ *Review of the Commission's Regulations Governing Programming Practices and Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951, 11964-65 (1995) ("Network/Affiliate NPRM").

²⁷ *Id.*

²⁸ *Id.* at 11967.

Although the Commission has noted that it is not the FCC's function to assure competitive equality in any given market, it has acknowledged its "duty at least to take such actions as will create greater opportunities for more effective competition among the networks in major markets."²⁹ If the freeze is lifted and if Petitioner is ultimately granted a construction permit for the new station, Petitioner intends to affiliate with The WB. Petitioner has an obvious interest, therefore, both as an existing and future affiliate of The WB, in helping the network to succeed. Indeed, even if the license is ultimately awarded to another entity, the public is served by the creation of a new station available for affiliation. Petitioner is well aware that the single most difficult impediment for The WB has been finding enough television stations with which it can affiliate to gain the requisite national reach.³⁰ At best, The WB has been the fifth, and often the sixth, entrant in those top 100 markets in which it has an affiliate. Coupled with the fact that

²⁹ *Television Broadcasters, Inc.*, 4 RR 2d 119, 123 (1965) (Commission granted a short-spacing waiver to an ABC affiliate based largely upon its finding that the station had inferior facilities compared to those available to the other national networks in the market, which resulted in a "serious competitive imbalance"), *recon. granted in part on other grounds*, 5 RR 2d 155 (1965). *See also Peninsula Broadcasting Corporation*, 3 RR 2d 243 (1964) (same); *New Orleans Television Corp.*, 23 RR 1113 (1962) (short-spacing waiver granted for the purpose of assuring the existence of a third truly competitive station in the market, thereby making available competitive facilities to the networks).

³⁰ The WB has, in a variety of proceedings, explained to the Commission that its primary challenge in establishing itself as a nationwide network has been finding a sufficient number of stations with which to affiliate. *See, e.g.*, Comments and Reply Comments of The Warner Bros. Television Network, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 (Oct. 30, 1995; Nov. 27, 1995); Reply Comments of The Warner Bros. Television Network, *Reexamination of The Policy Statement in Comparative Broadcast Hearings*, GC Docket No. 92-52 (Aug. 22, 1994). UPN has expressed similar difficulties in its own efforts to establish a nationwide presence. *See* Comments of the United Paramount Network, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 at 21-22 (Oct. 30, 1995).

almost two-thirds of all television markets have only four commercial television stations, the ability of any new network to find affiliates is severely limited.

Lifting the freeze in communities in which The WB has no primary, full power affiliate will afford the applicant entities the opportunity to build new stations with which The WB can develop a primary affiliation. There is no guarantee, of course, that Petitioner's application will be granted or that the station will ultimately affiliate with The WB. But whether it is The WB or some other new network that gains an affiliate and thereby strengthens its efforts to obtain a nationwide reach, the public benefits. Quite simply, therefore, a grant of this waiver request will further the significant public interest objective of encouraging the emergence of a new national network or networks.

2. Grant Of The Requested Waiver Will In Turn Enhance Diversity And Competition In The Local Marketplace

Lifting the freeze will also enure to the benefit of local viewers.³¹ In addition to the reasons unique to this community,³² the Commission has long recognized that network economies of scale enhance the type of programming available to viewers by fostering news gathering, editorializing and public affairs programming.³³ As the Commission has noted, “efficiencies that might flow from the stations forming the nucleus of a new network” would “permit the production of new and diverse, including locally produced, programming.”³⁴

³¹ Network/Affiliate NPRM, 10 FCC Rcd at 11955-56 (“Furtherance of diversity and competition remains the cornerstone of Commission regulation.”).

³² *See supra* at section II. A.

³³ *Multiple Ownership*, 10 FCC 2d at 45.

³⁴ *Review of the Commission's Regulations Governing Television Broadcasting*, 7 FCC Rcd (continued...)